# Marriage Equality and the German Federal Constitutional Court: the Time for Comparative Law

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Daniel Toda Castán Di 11 Jul 2017

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The enactment of marriage equality in Germany two weeks ago has sparked a constitutional debate that is taking place in Verfassungsblog like in many other media. There will probably be constitutional challenges to the introduction of marriage for same-sex couples in German law at the level of ordinary laws and without amendment of the German Basic Law, because many believe that a constitutional amendment would have been required. Hence, as it very often happens in Germany, the Federal Constitutional Court will very likely have to decide on the question. However, in the international scene of constitutional jurisdictions it will not need to break any ice.

Same-sex marriage has been the subject of decision of several constitutional jurisdictions in the past decades. Most of them have confirmed that, in their respective legal order, it was not unconstitutional. This has been the case in Spain, Portugal or France. In other states, constitutional jurisdictions have introduced same-sex marriage because they understood that its absence was unconstitutional. That was the result of the decisions of the South African Constitutional Court, the Supreme Court of Justice of the Nation of Mexico, the Brazilian National Judiciary Council, the U.S. Supreme Court and most recently the Constitutional Court of Taiwan. German scholarship has taken note of these decisions (see *Beck/Tometten*, Ehe für alle, in: Die Öffentliche Verwaltung, issue 14 (2016), pp. 581-587).

The concept of marriage stands in the middle of the discussions about the possible unconstitutional character of the new German act. Article 6(1) of the German Basic Law states that marriage and family enjoy the special protection of the state. Many argue that the word “marriage” in this context can only refer to marriage between a woman and a man, even more so taking into account that Article 6(1) was drafted back in 1949 and that, back then, nobody could have had same-sex marriage in mind. Recourse to comparative law is very instructive when trying to elucidate whether Article 6(1) of the Basic Law necessarily excludes same-sex marriage. Article 32(1) of the Spanish Constitution states: “Men and women have the right to marry with full legal equality”. Contrary to Article 6(1) of the German Basic Law, this article makes explicit reference to “men and women”. Hence, for the Spanish Constitutional Court, the wording of this constitutional provision arguably meant a higher obstacle to surmount than Article 6(1) does. The Spanish Constitutional Court considered that this wording did not necessarily mean that marriage could only happen between man and woman. The Spanish Constitutional Court rather interpreted that men have the right to marry with full legal equality, and so do women. Article 32(1), however, leaves the question of the gender of the spouse open. The Spanish Constitutional Court argues further that marriage as an institutional guarantee is not distorted by the introduction of same-sex marriage in a way that makes it unrecognisable. The amendments introduced to the Spanish Civil Code to this effect do not alter the existing regulation of marriage at all. They only make it applicable to same-sex couples, which enjoy the same rights and are subjected to the same obligations as married heterosexual couples. I would define my own position with regard to this judgment as a “concurring opinion”. I fully agree with the result and also with the literal interpretation of Article 32(1), but it should have been argued in another way. For me, the key question was not so much Article 32(1) but Article 14, our equality clause. Deciding on the basis of Article 14 would have clarified the question whether opening marriage to same-sex couples is a reversible option for the legislator. In a later decision on pension rights for same-sex partners, a new majority in the Spanish Constitutional Court introduced an *obiter dictum* stating that the decision on same-sex marriage did not mean that the legislator could not abolish it. In my opinion, the judgment of 2012 is not clear in this respect. However, the key argument about the institutional guarantee plays with the passage of time increasingly in favour of the constitutional irreversibility of same-sex marriage in Spain. After 12 years, one can argue that marriage as an institution would be rendered unrecognisable if same-sex couples were excluded from it again.

The Spanish Constitutional Court is not alone with its interpretation of a clause naming explicitly “men and women”. In its 2010 judgment *Schalk and Kopf v. Austria*, the European Court of Human Rights stated that it would not consider the wording of Article 12 of the European Convention on Human Rights as an obstacle to its applicability to same-sex couples any longer. Article 12 ECHR states that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” The decisive argument against same-sex couples in this judgment related to an insufficient European consensus on the matter.

When deciding on the compatibility of same-sex marriage with the German Basic Law, the German Federal Constitutional Court will enjoy the privilege of being able to draw on what its learned counterparts abroad have decided. The German Basic Law establishes, of course, its own standards that bind the Federal Constitutional Court, but learning from comparison can still be very useful for the German justices. They will not need to re-invent the wheel. The judgment of the Spanish Constitutional Court has been translated into English and has been commented in German legal scholarship (see *Rixen*: Das Ende der Ehe? – Neukonturierung der Bereichsdogmatik von Art 6 Abs. 1 GG: ein Signal des spanischen Verfassungsgerichts, in: Juristenzeitung, issue 18 (2013), pp. 864-873). The other decisions referenced above are also accessible. It is, hence, time for comparative law in Karlsruhe.

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SUGGESTED CITATION Toda Castán, Daniel: *Marriage Equality and the German Federal Constitutional Court: the Time for Comparative Law, VerfBlog,* 2017/7/11, http://verfassungsblog.de/marriage-equality-and-the-german-federal-constitutional-court-the-time-for-comparative-law/, DOI: https://dx.doi.org/10.17176/20170711-120227.